settlement agreements between the defendants and the Attorneys General and the Department of Justice, entered as final judgments on September 14, 1993, and April 4, 1994, respectively,[259] the defendant MSOs agreed to desist from these practices. The defendants did not, however, admit any violation of statutory or regulatory requirements.[260]

168. In the LMDS context, the Attorneys General point out that the settlement negotiated by the States ensured that satellite broadcasters, microwave relay television systems, and other providers that have attempted to compete against the cable television industry will be able to buy programming owned and controlled by the cable industry on "reasonable terms," and barred the defendants from discriminating against potential competitors offering a competing technology.[261] They contend that, because, like satellite broadcast service in the early 1990s, LMDS has the capacity to be a direct, facilities-based competitor to existing LECs and cable television companies, without a bar on eligibility "this new form of direct competition to the existing LECs and cable monopolists will be lost."[262]

169. The anticompetitive motives and behavior alleged to have been manifested by cable companies with respect to satellite broadcast service and addressed in the *Primestar Cases*, are similar to the motives and behavior that we anticipate with respect to incumbent entry into LMDS and are attempting to address here:

- The acquisition of licenses in order to forestall market entry by, and consequent competition from, a new competitor.

- The loss of a valuable opportunity to introduce competition into concentrated markets characterized by firms with substantial market power.

We believe that the conduct alleged to have been displayed in the *Primestar* case constitutes additional support, in line with that referred to as persuasive in *Cincinnati Bell*, for our assessment that LECs and cable companies should be barred from acquiring in-region 1,150 megahertz LMDS licenses until they face sufficient facilities-based competition in the provision of their respective services so that they no longer have substantial market power in the provision of those services.

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[259] New York v. Primestar Partners, 1993 WL 720677 (S.D.N.Y. 1993); Unites States v. Primestar Partners, 1994 WL 196800 (S.D.N.Y. 1994) (collectively, *Primestar Cases*).

[260] *See Cable Programming Order*, 10 FCC Rcd at 3121, n.83 (para. 33).

[261] Attorneys General Reply Comments to *Fourth NPRM* at 5; *see Cable Programming Order*, 10 FCC Rcd at 3112-13 & n.31 (para. 14).

[262] *Id.* at 6.

(b) LMDS as a Source of Competition

170. Our concern regarding LEC and cable eligibility is educated by the substantial record collected in this proceeding on the capabilities of LMDS. LMDS has the potential to provide fixed video, voice, and data services, services that may be one-way or two-way. We have stated in this Order that we will not specify the type of service that must be offered by LMDS operators but will allow the marketplace to determine the best use of this spectrum.[263] Thus, LMDS licenses may be used to provide service in the local MVPD market, the local telephone market, a broadband data market, or a combination of these possibilities. For example, CellularVision is currently providing one-way video service, and TI's plan explicitly incorporates interactive video, voice, and data in an integrated system. LMDS offers a significant amount of capacity, larger than currently available wireless services. For instance, according to TI, the LMDS system they have manufactured for use in other countries can be used to serve 16,000 telephone subscribers, in each LMDS cell with a three-mile radius, concurrently with about 200 video-on-demand channels.[264] For the reasons discussed below, we believe that the likelihood that LMDS can increase competition in either the local multichannel video or local telephone exchange markets (or both simultaneously) is high and warrants analysis in order to determine whether in-region LEC and cable TV incumbents should be permitted to acquire and hold initial licenses.

171. While all bidders in an auction for LMDS licenses can be expected to base their bids on their individual assessment of the most efficient use of the spectrum, LECs and cable companies assessing the value of in-region LMDS licenses would have the additional incentive to protect their market power and preserve a stream of future profits. Thus, whereas a new entrant lacking a share in any local market can be expected to use the LMDS license to compete in a range of possible markets, it is reasonable for us to conclude that a local incumbent would likely attempt to foreclose the possibility of such competitive entry by obtaining the LMDS license and using it only to complement its current operations, not to compete with them. We believe that this incentive will skew its decisions regarding the uses to which LMDS spectrum is put, resulting in inefficient use of the spectrum, and will not promote competition, two factors we are required to assess under Section 309(j)(3)(B) and Section 309(j)(3)(D) when specifying eligibility and other characteristics of licenses to be issued by competitive bidding.[265]

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[263] We expect that the uses of LMDS will become evident as the technology is further developed and as the actual demand for the various services is identified over the next few years.

[264] Texas Instruments Letter Notice of *Ex Parte* Communication, June 6, 1995.

[265] 47 U.S.C. §§ 309 (j)(3)(B), 309(j)(3)(D).

172. Even if one incumbent were to use LMDS to enter the other's market, increasing competition in that market relative to the status quo, the potential to increase competition will have been reduced because there would be no increase in the level of competition in that incumbent's original market. Thus, we have determined to maximize the opportunity for competition in two areas of telecommunications demonstrating a present lack of competition, by reserving the 1,150 megahertz LMDS license for an entrant without market power in either the local telephony or MVPD markets in the BTA.

173. In assessing the need to apply eligibility restrictions to in-region LECs and cable TV incumbents, we are cognizant of the view that, in specific circumstances, a dominant firm has the incentive to expend resources to perpetuate the status quo. Thus, incumbents are likely to be high bidders for LMDS licenses.[266] Moreover, we find that the temptation for preemptive acquisition is particularly compelling here because of the unusually large size of the LMDS spectrum allocation. A single, large spectrum block of relatively unused spectrum will be auctioned in each service area, and development of equipment and technology is already quite advanced. As noted above, the capacity of an LMDS license is unprecedented. Although an incumbent might use an in-region LMDS license to enter and increase competition in some other market (for example, a LEC might use LMDS to provide MVPD operations) this would not assuage our concerns about competition because, even if such use did take place, there is no assurance that this would be the most economically efficient use of the spectrum licensed.

174. A number of theoretical economic models demonstrate the actions a firm can take to retain a monopoly or dominant position in a market.[267] These actions can include creating entry barriers to competitors by strategically locating retail outlets, by introducing a large number of similar brands, by making substantial expenditures in research and development to win a patent race, or by investing in significant additional productive capacity or inputs.[268]

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[266] *See* K. Baseman, "The Economics of Bidding for Scarce Resources: The Lessons of Monopoly Preemption as Applied to FCC Auctions of LMDS Licenses," WebCel Comments to *Fourth NPRM*, Attachment.

[267] *See, e.g.*, B. Eaton & R. Lipsey, *The Theory of Market Preemption: The Persistence of Excess Capacity and Monopoly in Growing Spatial Markets*, 46 Econometrica 149; R. Gilbert & D. Newbery, *Preemptive Patenting and the Persistence of Monopoly*, 72 Am. Econ. Rev. 514 (June 1982); T. Lewis, *Preemption, Divestiture, and Forward Contracting in a Market Dominated by a Single Firm*, 73 Am. Econ. Rev. 1092 (Dec. 1983). *See also* F. Scherer, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 252-60 (1980); J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 346-52 (1988); R. Gilbert, *Mobility Barriers and the Value of Incumbency*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, R. Schmalensee & R. Willig, ed. (1989).

[268] R. Gilbert, *Mobility Barriers and the Value of Incumbency*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, R. Schmalensee & R. Willig, ed. (1989).

175. The economic principle at work in these circumstances is that a monopolist stands to lose more profits than a duopolist has to gain; thus, the monopolist has a greater incentive to preempt than an entrant has to enter.[269] The strongest predictions of a firm's incentive to outbid (or deter) a potential entrant result when the incumbent is a monopolist and compares its current position to a duopoly outcome. Several commenters acknowledge the incumbent LECs' and cable television firms' current dominant positions in their respective markets and assert that these firms' incentives would be to block entry into their respective geographic markets.[270] Accordingly, we believe there is sufficient economic support to limit LECs' and cable television firms' in-region eligibility to participate in the LMDS auction.

(c) Usefulness of Short-Term Eligibility Restrictions

176. The third element of our inquiry is whether eligibility restrictions are the best means of achieving our goal of increasing competition in the LEC and MVPD markets. We find that they are. We requested comments on allowing unrestricted eligibility for LMDS auctions, but limiting the use to which the spectrum could be put by incumbent telephone and cable television firms.[271] Commenters generally oppose a use restriction.[272] We believe that use restrictions will not solve the primary competitive concern raised by incumbent acquisition of LMDS. To protect its market position, an incumbent has an incentive to use LMDS spectrum to provide services it does not provide, and to restrict output of its current service. Therefore, preventing the incumbent from providing its current service with the newly acquired spectrum will not constrain its behavior in a way that will make its current market more competitive. We also believe that use restrictions would constitute an unreasonable intrusion into firms' operations and be administratively difficult to enforce. In addition, since we do not know at this time whether the LMDS spectrum is best used for local telephone, video, or something else, a use restriction could substantially harm the efficient use of this spectrum -- one of our paramount statutory mandates.

177. Persuasive comments from several parties, including DOJ, various State Attorneys General, and staff of the FTC, have convinced us that in this proceeding, on balance, it is preferable to impose eligibility restrictions rather than to rely on *ex post*

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[269] J. Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 348-49 (1988).

[270] *See* FTC Reply Comments to *Fourth NPRM* at 4-7; DOJ Reply Comments to *Fourth NPRM* at 6-7; CellularVision Comments to *Fourth NPRM* at 12; CPI Comments to *Fourth NPRM* at 6-7; ComTech Comments to *Fourth NPRM* at 8; MCI Comments to *Fourth NPRM* at 3; SkyOptics Comments to *Fourth NPRM* at 9; Webcel Comments to *Fourth NPRM* at 7.

[271] *Fourth NPRM*, at para. 131.

[272] *See, e.g.*, DOJ Reply Comments to *Fourth NPRM* at 8.

remedies such as enforcement of the antitrust laws.[273] In addition, while we recognize that restrictions may prevent incumbent firms from experimenting with certain technology and market combinations, and might conceivably foreclose or delay desirable entry by incumbents into new markets, we believe that we have designed restrictions that minimize the likelihood of these potential negative impacts. As further explained below, the restrictions will be temporary, ending when the likelihood of anticompetitive behavior has abated, and they will be structured as flexibly as possible to minimize adverse limitations on incumbents. Thus, there is no evidence that the temporary restrictions will result in a sacrifice of efficiency gains. With respect to efficiency gains, we note that, despite our specific query on this topic in the *Fourth NPRM*, no substantive evidence of economies of scope or other efficiencies of joint operation of an LMDS system by an incumbent LEC or cable operator has been provided by commenters.[274]

178. In addition, the 1996 Telecommunications Act recognizes the anticompetitive implications of market power and recognizes the need to reduce market power by encouraging competitive entry into communications markets.[275] Nevertheless, a number of commenters who oppose any restrictions on LECs or cable companies argue that such restrictions are inconsistent with the 1996 Act.[276] These arguments are rebutted by several commenters who support restrictions.[277] DOJ, for example, argues that restrictions on "in-region" ownership of an LMDS license are consistent with the 1996 Act because they would promote competition by enabling LECs and cable companies to offer out-of-region local telephone or cable service without any restrictions, or in-region service using a means other than LMDS.[278] Section 613(c) of the Communications Act, for example, grants the Commission authority to prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications (including, presumably, LMDS) that operate in the same community served by the cable system. Finally, regarding prior Commission precedent, we note that our rules prohibit cellular licensees from owning an A, B, or C-block PCS license in the same geographic area. Therefore, we find that our decision to restrict LEC

[273] The Attorneys General speak directly to the problems associated with relying on *ex post* remedies. *See* Attorneys General Reply Comments to *Fourth NPRM* at 4-6.

[274] For example, we thought that LECs or cable firms might achieve savings not available to new entrants by taking advantage of their current infrastructure and market presence.

[275] *See, e.g.*, Section 10 of the Communications Act, 47 U.S.C. § 160.

[276] *See* USTA Comments to *Fourth NPRM* at 5; Bell Atlantic Comments to *Fourth NPRM* at 7.

[277] *See, e.g.*, WebCel Comments to *Fourth NPRM* at 12-15; CPI Comments to *Fourth NPRM* at 2-6.

[278] DOJ Reply Comments to *Fourth NPRM* at 13.

or cable company ownership of LMDS licenses is consistent with the provisions and policies of the Communications Act.

179. Commenters from the rural telephone community argue against any restrictions on LEC ownership of LMDS licenses.[279] They discuss why, even if the Commission decides to impose restrictions on LECs, we should exempt those LECs that are rural telephone companies. They reason that unless rural telephone companies are able to participate in the LMDS market, consumers in rural areas are likely to be deprived of the benefits of this new service. We agree that it would be undesirable to impair the provision of LMDS service to rural consumers. Although we have decided to impose some short-term restrictions on LECs, including rural telephone companies, we do not believe that these restrictions, as crafted, will hinder the introduction of LMDS in rural areas. Rural LECs have not made the case that they are the only entities that can provide LMDS in their service territories.

180. Therefore, if it is profitable to provide service in rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service. In addition, because rural LECs are generally small, they are unlikely to have the degree of overlap with BTAs necessary, as explained below, to trigger our eligibility restriction. Further, to the extent a rural (or any other) LEC does exceed the attributable interest limit we are adopting, we are permitting such a LEC to obtain an LMDS license and then to divest any overlapping attributable interests. A rural LEC would also have the option of acquiring a 150 megahertz license in its service area. Finally, to the extent any LEC is unsuccessful in the LMDS auction, it will still have the opportunity to participate -- subject to the eligibility rules -- by either acquiring spectrum from an LMDS licensee through the partitioning and disaggregation rules we are adopting, or by contracting (in a way that does not circumvent any applicable ownership and control requirements and does not raise competitive concerns) with the LMDS licensee to provide service in its telephone market area.[280]

181. In addition to satisfying our test for imposition of eligibility restrictions, we believe that establishing temporary, in-region eligibility restrictions on the 1,150 megahertz LMDS licenses best comports with the auction goals of the Communications Act.[281] In particular, these minimal restrictions will promote economic opportunity and competition, and

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[279] Ad Hoc RTG Comments to *Fourth NPRM* at 1-6; Alliance Reply comments to *Fourth NPRM* at 1-5; Farmers Tel Comments to *Fourth NPRM* at 1-3; NTCA Comments to *Fourth NPRM* at 1-5; Pioneer Comments to *Fourth NPRM* at 1-4.

[280] This last option is suggested by CPI. *See* CPI Reply Comments to *Fourth NPRM* at 10.

[281] *See* Section 309(j)(3) of the Communications Act, 47 U.S.C. § 309(j)(3).

will avoid excessive concentration of licenses by disseminating licenses among a wide variety of applicants.

(3) Effects of LEC and Cable Company Eligibility on Competition: 150 Megahertz Licenses

182. We conclude that acquisition by incumbent LECs or cable television firms of the in-region 150 megahertz LMDS license does not pose significant competitive concerns. First, we believe that acquisition of the licenses for both the large and small spectrum blocks is not necessary in order for entrants to establish viable systems; the license for the large block alone should provide ample spectrum capacity. Thus, incumbents should have no incentive to acquire the license for the small block solely to hobble the development of the 1,150 megahertz licensees. Second, the 150 megahertz license provides inadequate capacity to enable the provision of attractive MVPD service. Thus, cable company acquisition of this license raises no anticompetitive concerns. Third, given the fact that we have now provided for an additional competitive option in the form of the 1,150 megahertz licensee, we find that incumbent LECs will not have a meaningful incentive to acquire the 150 megahertz license in order to preempt entry and slow the development of future competition.

(4) Effects of CMRS and MMDS Eligibility on Competition

183. With respect to CMRS providers, the only comments in the record addressing the issue of eligibility for such providers support our tentative conclusion in the *Third NPRM* that participation by CMRS firms raises no competitive concerns because LMDS cannot be used to provide mobile service.[282] With one exception,[283] no comments to the *Fourth NPRM* addressed this issue nor the related question of whether to count LMDS spectrum as part of the CMRS spectrum cap. Since the issuance of the *Third NPRM*, we have authorized CMRS licensees to provide fixed services.[284] To the extent that CMRS licenses are most valuable for mobile uses, there is no reason to be concerned about CMRS acquisition of fixed LMDS licenses. To the extent that CMRS licenses may be used to provide fixed services, we find that the combination of CMRS and LMDS in the same BTA would imply no market power. First, there are existing wireline competitors, especially the incumbent LEC and cable

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[282] *Third NPRM*, 11 FCC Rcd at 90 (para. 102).

[283] Although the *Fourth NPRM* solicited additional comment on this issue, only BellSouth responded, supporting the Commission's tentative conclusion not to restrict CMRS providers. *See* BellSouth Comments to *Fourth NPRM* at 2-3.

[284] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Services, WT Docket No. 96-6, First Report and Order, 11 FCC Rcd 8965 (1996) (*CMRS Flexible Service Report and Order*).

television firm, that can provide fixed wireless services. Second, our CMRS spectrum cap will prevent anticompetitive concentration of CMRS spectrum itself. For these reasons, we adopt our tentative conclusion that CMRS providers will be eligible for LMDS auctions in their service areas, and that LMDS spectrum will not count against the CMRS spectrum cap.

184. The *Third NPRM* sought comment on the issue of MMDS licensee eligibility, and stated our reluctance to restrict the opportunity of MMDS licensees to obtain LMDS spectrum, absent compelling public interest arguments to the contrary.[285] In responding to the *Third NPRM*, M3ITC expresses concern at the prospect of MMDS licensee eligibility for LMDS auctions, speculating that with sufficient investment MMDS firms could offer two-way services with their existing assigned spectrum.[286] There is no compelling evidence, however, that MMDS licensees possess market power sufficient to distort their incentives to acquire and deploy in-region LMDS. Moreover, as WCA argues, the possibility of employing LMDS for two-way communications makes it a potentially beneficial complement to MMDS.[287] The combination may allow more effective challenges to the dominant incumbent firms, and should present minimal competitive risks. Therefore, we find that MMDS licensee eligibility to acquire LMDS spectrum in their service areas is consistent with our objective to increase competition.

c. Eligibility Rules

185. We now turn to the definitions that will be used to determine if an entity is an "incumbent" and, if so, whether the eligibility restrictions will apply. The *Fourth NPRM* did not specifically address the issue of defining an "incumbent." Given the dynamic nature of the local exchange and MVPD businesses, we believe it is important to establish a clear definition of the term "incumbent" in the context of any eligibility rules. In order to achieve this clarity, we have decided to adopt definitions drawn directly from the statute. Thus, we define an incumbent LEC as one that comports with the statutory definition of an incumbent LEC in Section 251(h) of the Communications Act,[288] and we define an incumbent cable

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[285] *Third NPRM*, 11 FCC Rcd at 93 (para. 107).

[286] M3ITC Comments to *Third NPRM* at 4-5.

[287] WCA Comments to *Third NPRM* at 4.

[288] 47 U.S.C. 251(h) contains the following definition of an incumbent local exchange carrier:

> (1) . . . the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that -- (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the

company as one that is franchised to provide cable service and is not subject to effective competition pursuant to Section 623(l) of the Communications Act.[289]

186. In the *Fourth NPRM,* the Commission sought comment regarding whether an incumbent LEC or cable company should be considered "in-region" if 20 percent or more of the population of the BTA is within the LEC's authorized telephone service area or the cable company's franchised service area.[290] Comments from those parties supporting geographically limited restrictions generally favor the use of 20 percent or more of the population of the BTA being within the LEC's authorized telephone service area or the cable company's franchised service area as the test for overlapping service areas, or being "in-region."[291]

Commission's regulations . . . ; or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i); (2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS -- The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

[289] 47 U.S.C. § 543(l) contains the following definition of effective competition:

(1) The term "effective competition" means that -- (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system; (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households of that franchise area: or (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

[290] *Fourth NPRM*, at para. 132.

[291] *See, e.g.*, MCI Comments to *Fourth NPRM* at 8; Roseville Comments to *Fourth NPRM* at 7; Webcel Comments to *Fourth NPRM* at 24. An exception is CPI, which argues for a permissible overlap of service areas not to exceed 5 percent. *See* CPI Reply Comments to *Fourth NPRM* at 9. *See also* ComTech Comments to

187. Even though many commenters concur with the 20 percent overlap proposal, we believe, upon further review, that we should adopt a 10 percent overlap test, for the following reasons. First, we stated that the approach we suggested in the *Fourth NPRM* was meant to parallel the geographic overlap percentage contained in the cellular and PCS cross-ownership rule,[292] or 10 percent.[293] That approach, however, was erroneously crafted in describing the rule as establishing a 20 percent benchmark. Second, we believe a 10 percent threshold is a better indicator of conflicting interests and, given the ability of a licensee to partition its license to come into compliance, a fair and more effective means of accomplishing the public interest goal of fostering competitive markets.

188. Third, as we have found in the case of cellular and PCS providers, we believe that "an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the . . . operator is slight."[294] Finally, we intended to adopt a rule that would conform with the overlap rule used in conjunction with the CMRS spectrum cap. We believe as a general matter that it is preferable to have rules for wireless spectrum that are as consistent as possible for the sake of overall simplicity, ease of compliance, and administrative efficiency. Therefore, we are adopting rules that consider an incumbent LEC or cable company to be "in-region" if 10 percent or more of the population of the BTA is within the LEC's authorized telephone service area or the cable company's franchised service area.

189. The *Fourth NPRM* also sought comment regarding what should constitute an attributable interest for an incumbent LEC or cable operator. We suggested that we would consider an ownership interest of at least 10 percent by an incumbent LEC or its affiliate, or an incumbent cable company or its affiliate, would be considered an attributable interest for purposes of determining the applicability of any eligibility restrictions.[295] Comments on this

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Fourth NPRM at 8 (arguing for an overlap rule restricting incumbent LEC or cable entry only if the incumbent serves 15 percent or more of the households of the BTA).

[292] *Fourth NPRM*, at para. 132.

[293] 47 CFR § 20.6(c).

[294] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, 11 FCC Rcd 7824, 7876 (para. 107) (1996) (*Broadband PCS Report and Order*).

[295] *Fourth NPRM*, at para. 133.

aspect of the proposal from those supporting geographically limited restrictions generally support using 10 percent ownership as an attribution threshold.[296]

190. We have decided to adopt attribution rules that apply when an ownership interest is at least 20 percent, for the following reasons. First, we have concluded that a 20 percent attribution rule provides the proper balance between "encourag[ing] capital investment and business opportunities" in LMDS,[297] and guarding against potential competitive harms associated with the exercise of undue influence by incumbent LECs and cable companies in connection with the operations of LMDS licensees. Second, we believe that one of the factors leading us to establish the 20 percent benchmark for CMRS also applies in the case of LMDS, namely, that "increased flexibility in our rules will enable [LMDS] providers to adapt their services to meet customer demand."[298]

191. Third, we also conclude that establishment of a 20 percent attribution level will facilitate a wide variety of service providers to enter the marketplace, thus promoting the competitive delivery of wireless services, with attendant benefits to consumers and the national economy.[299] Finally, as with the geographic overlap issue discussed above, we believe there are good reasons to adopt rules that are consistent with existing rules governing wireless service licensees. The rules governing CMRS services use 20 percent as the ownership level that constitutes an attributable interest in a license. As a consequence of our decision, no entity having an ownership interest of at least 20 percent in an incumbent LEC or cable company will be permitted to hold a 20 percent or greater interest in a 1,150 megahertz in-region LMDS licensee.

192. In determining ownership interests, affiliate relationships will be quantified using a multiplier, and management and joint marketing agreements may be considered to be attributable interests under certain circumstances. The attribution rules, among other things, will provide that: officers and directors have an attributable interest in their company; non-voting stock in excess of 20 percent is attributable; stock interest held in trust is attributable to those who have or share the power to vote or sell the stock; debt and instruments such as warrants with rights of conversion to voting interests are generally not attributable until conversion is effected; and limited partnership interests are attributable.

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[296] *See, e.g.*, CPI Comments to *Fourth NPRM* at 13.

[297] *Broadband PCS Report and Order*, 11 FCC Rcd at 7881 (para. 119).

[298] *Id.* (footnote omitted).

[299] *Cf. id.*

193. In the *Fourth NPRM,* we proposed to restrict eligibility of incumbent LEC and cable companies to obtain in-region LMDS licenses for a limited time.[300] While we have determined that carefully-tailored temporary restrictions on incumbent LECs and cable companies are necessary to help assure that competition in the LEC and MVPD markets is enhanced with the licensing of LMDS, we believe it is possible to be less restrictive than our proposal in one significant respect. We find no compelling public benefit to be achieved by foreclosing incumbent LECs and cable companies from participating fully in the auction of 1,150 megahertz LMDS licenses, including the auction of in-region licenses, so long as such firms subsequently come into compliance with our eligibility rules. As noted in reply comments from the Staff of the FTC, a cable MSO that owns a system contained entirely within a BTA should be able to sell this system to avoid competitive problems associated with this overlapping ownership interest.[301]

194. This example highlights the possibility that incumbent LECs and cable companies might find it advantageous to obtain a large LMDS license and then to divest sufficient overlapping interests to bring them into compliance with our ownership restrictions.[302] Therefore, we are adopting rules that permit incumbent LECs and cable companies to participate fully in the auction of 1,150 megahertz licenses if they agree to divest overlapping ownership interests. LMDS licensees will have 90 days from the date of the final grant of their license to submit to the Commission an application to assign or transfer control of the conflicting portion of its LMDS license or to certify that it has come into compliance with the Commission's eligibility restriction in Section 101.1002(a) of the Commission's Rules.

195. As discussed below, we are providing LMDS licensees additional flexibility to disaggregate their LMDS licenses into smaller spectrum blocks. However, we will not permit licensees to use disaggregation as a means of divesting overlapping ownership interests to comply with the attribution rules for LMDS. The substantial flexibility LMDS licensees will have to use their spectrum to provide any service that is consistent with the broad technical parameters established for this service would make it impossible to develop and enforce a system that uses a reduction in the amount of licensed spectrum as an objective measure of compliance with our ownership restrictions. We note, however, that a licensee may transfer a

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[300] *Fourth NPRM*, at paras. 135-136.

[301] *See* FTC Reply Comments to *Fourth NPRM* at 11.

[302] Such flexibility should be particularly useful for those rural LECs that may have overlapping ownership interests in a BTA. Although we anticipate that most rural LECs would not have sufficient overlap of their authorized service area with the LMDS service area to be affected by the eligibility restrictions we are adopting, the additional flexibility to divest such overlapping ownership interests should further ameliorate any potential negative impact on these entities.

portion of its ownership interest in order to meet the attribution limitations for LMDS. In addition, licensees will be permitted to geographically partition their spectrum in order to come into compliance with our eligibility restrictions.

196. We tentatively concluded in the *Fourth NPRM* that any restrictions on incumbent LECs and cable companies should be temporary, and proposed two alternatives. First, the restrictions could end when competition in the relevant market, LEC or MVPD, is such that the incumbent no longer has market power. Second, the restrictions could end on a date certain, such as three to five years hence, when it would be reasonable to assume that the market power of the incumbents would have been reduced sufficiently to allay our competitive concerns about their participation in the LMDS market. Those commenters that support limited restrictions generally agree with the concept of a competition-based test to end restrictions on incumbents. There is no consensus, however, on the best means of measuring when competition is sufficient to permit incumbent entry.

197. WebCel, for example, while recognizing the limitations of using the competitive checklist for RBOC entry into the inter-LATA and long distance markets for all LECs, and the four-pronged test for effective cable competition in Section 623(l) of the Communications Act, would nonetheless use these tests because they would be relatively simple to apply.[303] CPI, however, argues that neither of these tests is appropriate and that instead the Commission should place the burden on incumbents to demonstrate in each case that effective competition exists and would continue even if the incumbent were to enter the market as an LMDS licensee.[304] Only two commenters address the question of establishing a sunset date for incumbent restrictions, CPI and RioVision. CPI opposes establishing a sunset as too arbitrary and suggests instead that the Commission establish a date certain by which it would reevaluate the need for the restrictions.[305] RioVision comments that five years may be a reasonable date on which to end the restrictions.[306]

198. We agree with those parties arguing that the competitive checklist would be inappropriate for use in determining whether conditions are suitable to allow LEC acquisition of in-region LMDS licenses. We think that there will be sufficient entry and increases in competition in the markets at issue here for us to be able to sunset the restrictions on incumbent LECs and cable companies three years after the effective date of the LMDS rules. Based on our assessment of the state of LMDS technology and estimates of when entry into

[303] WebCel Comments to *Fourth NPRM* at 25.

[304] CPI Comments to *Fourth NPRM* at 14-15.

[305] *Id.* at 15.

[306] RioVision Comments to *Fourth NPRM* at 3.

the LEC and cable markets is likely, we believe three years is an appropriate initial period to keep these restrictions in place. Further, we have a statutory obligation to review all regulations every two years, beginning in 1998, to determine whether competition has increased sufficiently to make these regulations unnecessary.[307] Therefore, we will undertake a review of these eligibility restrictions and the relevant competitive developments in 2000 to determine if sufficient competition has emerged to allow sunset of the LMDS restrictions. The restrictions may be extended if we determine that the incumbent LEC or cable company still have substantial market power in the provision of those services.

199. In addition, we recognize that some incumbent LECs or cable companies might be able to show earlier than three years after the effective date of the rules we are adopting in this Order that the actual conditions in a particular market are sufficiently competitive and rivalrous so that the restriction is no longer necessary promote competition in the telecommunications marketplace.[308] In considering a petition for waiver of or forbearance from the restriction, we will generally be guided by the *1992 Merger Guidelines*,[309] because the competitive effects of an acquisition by an incumbent LEC or cable company of an in-region LMDS license are likely to be similar to the effects of a merger between that company and an actual or hypothetical company whose principal competitive asset is that license. In particular, some of the factors we will consider in determining whether a particular market actually is sufficiently competitive at the time of the petition are:

(1) the number and capacity of competing providers of local telephone or multichannel video services, especially those with independent means of distribution, that are available to a significant number of consumers in the geographic region at issue;

(2) the substitutability of the services of those competing providers with the local telephone and multichannel video services offered by the incumbent LEC or cable firm;

(3) evidence as to whether the LEC or cable company could or would lose a significant portion of its subscribers to its competitors if it unilaterally increased its prices or lowered the quality of its services;

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[307] 47 U.S.C. § 161.

[308] See para. 159, *supra.*

[309] *See* Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (Apr. 2, 1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 7, 1992) (*1992 Merger Guidelines*).

(4) the regulatory environment for competing providers in the relevant geographic region; and

(5) whether the LEC or cable company has in fact experienced a significant loss in market share due to the entry of new competitors or the expansion of existing competitors.[310]

If the LEC or cable company is successful in making such a demonstration, then such showing will constitute a sufficient basis for the Commission to waive or forbear from applying the eligibility restrictions that apply to that LEC or cable company. We will entertain such showings after the initial award of licenses.

5. Flexible Service and Framework for Licensing

a. Scope of Services

(1) Background; Comments

200. In the *First NPRM,* we proposed to redesignate the 28 GHz band from a fixed common carrier point-to-point microwave service to a local multipoint distribution service that would include non-common carrier services.[311] We found that the band was not being utilized, that petitioners had demonstrated an ability to use it for MVPD, and that such use would serve the public interest. We proposed to implement LMDS under flexible rules that would allow a licensee to provide a video programming or telecommunications service and provide sufficient flexibility to accommodate different types of point-to-point and point-to-multipoint communications services.

201. To accommodate the expanded service definition, we proposed to allow licensees to provide not only a common carrier service, but also a non-common carrier service. We pointed out that this would be consistent with our regulation of MDS and certain domestic satellites, which allow the election of common carrier or non-common carrier status.[312] We

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[310] *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report and Order, FCC 96-424, released Oct. 31, 1996, at paras. 21-28; Motion of AT&T To Be Classified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3303-09 (paras. 57-73) (1995).

[311] *First NPRM,* 8 FCC Rcd at 557-61 (paras. 1-3, 14).

[312] Domestic Fixed-Satellite Transponder Sales, CC Docket No. 82-45, Memorandum Opinion, Order and Authorization, 90 FCC 2d 1238 (1982) (*Domsat Sales Memorandum and Order)* ; Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, 2 FCC Rcd 4251, 4251-53 (paras. 5-14) (1987) (*MDS Report and Order*).

proposed that the LMDS provider elect its regulatory status as a common or non-common carrier based on the nature of the service offerings under the definitions established in *NARUC I*.[313] LMDS providers would choose to operate as a common or non-common carrier on a channel-by-channel or cell-by-cell basis. We requested comments.

202. In the *Third NPRM*, we considered the comments filed to the *First NPRM*. They expect LMDS to include video distribution, broadband video telecommunications, and two-way data and voice subscriber-based services, and support the flexibility to choose authorization on a common carrier or non-common carrier basis in order to choose the category of services they want to offer.[314] We renewed our proposal in the *First NPRM* to allow the applicant or licensee to elect its status, based on the services it seeks to provide. However, we proposed additional licensing options requested by commenters to treat all LMDS applicants or licensees as common carriers, unless they submitted information to the contrary. We requested comments.

203. Of the comments filed in response to our service proposals in the *Third NPRM*, all agree that LMDS should be implemented to encompass both telecommunications and video programming services, and to permit maximum flexibility in allowing licensees to provide the entire array of services. They support our proposal to allow the applicant or licensee to choose its regulatory status as a common carrier or non-common carrier, based on services that it chooses to provide.[315]

204. For example, CellularVision urges us to adopt a regulatory approach that freely allows a licensee to offer competitive video and telephony services without unnecessary regulatory rigidity. It asserts that its technology allows a unique flexibility to offer any combination of video, voice, and data services and to vary the mix within each cell. ComTech asserts that LMDS will not only be used for MVPD, but also in many different

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[313] National Association of Regulatory Utility Commissioners v. F.C.C., 525 F.2d 630 (D.C. Cir. 1985) (*NARUC I*).

[314] *Third NPRM*, 11 FCC Rcd at 88 (paras. 92-93). *See, e.g.*, Ameritech Comments to *First NPRM* at 4-11; CellularVision Comments to *First NPRM* at 5-6, 25-32; GTE Comments to *First NPRM* at 12-13; Pacific Telesis Comments to *First NPRM* at 3; TDS Comments to *First NPRM* at 8-10; US West Comments to *First NPRM* at 4-10; Video/Phone Comments to *First NPRM* at 8-10.

[315] Ameritech Comments to *Third NPRM* at 5; Bell Atlantic Comments to *Third NPRM* at 7; BellSouth Comments to *Third NPRM* at 8; CellularVision Comments to *Third NPRM* at 20-22; ComTech Comments to *Third NPRM* at 5; Emc[3] Comments to *Third NPRM* at 7; GTE Comments to *Third NPRM* at 7; NCTA Comments to *Third NPRM* at 5; PTWBS Comments to *Third NPRM* at 2; RioVision Comments to *Third NPRM* at 3; TI Comments to *Third NPRM* at 15-16; Titan Comments to *Third NPRM* at 3; WCA Comments to *Third NPRM* at 3.

ways in different market situations. It asserts that the technology is extraordinarily flexible and can be configured uniquely and efficiently on a variety of bases. Ameritech contends that, because of the early level of technical development and the uncertainty regarding the services ultimately to be offered, it would be premature to force the nascent LMDS industry into a regulatory pigeonhole.[316]

(2) Decision

(a) Flexible Service Definition

205. We find that it is in the public interest to adopt our proposal to implement LMDS and authorize licensees to provide non-common carrier services as well as common carrier services. We agree with commenters that it is essential to adopt a broad service definition for LMDS that encompasses the wide variety of services not only contemplated by commenters, but also developed in the future after service is initiated. Commenters establish that the nature and extent of potential services is broad and changing. Since our initial proposals in the *First NPRM,* new advances in wireless technology have made possible a greater variety of interactive telecommunications and video services. Moreover, the 1996 Act embodies a national telecommunications policy which requires that we promote competition in telecommunications markets through removing regulatory barriers to entry, encouraging technological developments, and ensuring that consumer demand is met. By authorizing licensees to provide non-common carrier services as well as common carrier services, we ensure that licensees can meet all service demands.

206. Since the *First NPRM,* we have enhanced the flexibility of licensees in other wireless services that have broad service definitions that include common carrier and non-common carrier services. In adopting a new application form for MDS, we confirmed that MDS includes alternative services and we provided applicants the option on the new form to indicate their choice for common carrier or non-common carrier regulatory status.[317] For satellite services, we have determined to provide all U.S.-licensed fixed satellite service systems with a choice between offering common carrier and non-common carrier services and

[316] CellularVision Comments to *Third NPRM* at 21; ComTech Comments to *Third NPRM* at 5; Ameritech Comments to *Third NPRM* at 5.

[317] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9619 (para. 59), Appendix D (1995) (*MDS and ITFS Competitive Bidding Report and Order*).

the opportunity also to elect their regulatory classification in their applications.[318] In another proceeding, we have adopted streamlined rules in Part 25 for satellite services to use a simplified procedure to change licenses from non-common carrier status to common carrier status.[319] When we implemented DBS systems under interim rules we adopted a policy to permit the dual provision of common and non-common carrier services,[320] which continues under the permanent rules.[321] The flexibility we adopt for LMDS is consistent with the treatment accorded these services.

207. To ensure the flexibility in LMDS service offerings that commenters seek and we proposed, we will permit any fixed terrestrial uses that can be provided within the technical parameters for LMDS. We conclude that, for now, our significant allocation of spectrum under such a broad and flexible service definition should permit licensees to satisfy a broad array of their customers' communications needs, whether through one or multiple service offerings. Although LMDS is allocated as a fixed service, we know of no reason why we would not allow mobile operations if they are proposed and we obtain a record in support of such an allocation.[322] We believe this would be consistent with our goal of providing LMDS licensees with maximum flexibility in designing their systems. We have authorized other wireless services to include mobile and fixed services, depending on whether

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[318] Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41, Notice of Proposed Rulemaking, 10 FCC Rcd 7789, 7795-96 (paras. 30-33) (1995), Report and Order, 11 FCC Rcd 2429, 2436 (paras. 45-50) (1996) (*DISCO I Report and Order*).

[319] Streamlining the Commission's Rules and Regulations for Satellite Application and Licensing Procedures, IB Docket No. 95-117, Notice of Proposed Rulemaking, 10 FCC Rcd 10624 (1995), Report and Order, FCC 96-425, released Dec. 16, 1996 (paras. 32-34) (*Satellite Rules Report and Order*).

[320] Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference, Gen. Docket No. 80-603, Notice of Proposed Policy Statement and Rulemaking, 86 FCC 2d 719, 750 (1981), Report and Order, 90 FCC 2d 676, 706 (1982) (*Interim DBS Report and Order*), *aff'd sub nom.* National Assoc. of Broadcasters v. F.C.C., 740 F.2d 1190 (1984).

[321] Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Notice of Proposed Rulemaking, 11 FCC Rcd 1297 (1995), Report and Order, 11 FCC Rcd 9712 (1995).

[322] We would at that time also revisit our decision not to include LMDS in CMRS spectrum for purposes of the spectrum cap.

developments in the service and related equipment demonstrate a need for changing the rules and a capability for mobile and fixed services to coexist in these bands.[323]

208. We give applicants and licensees the flexibility to design their service offerings in response to market demand. The service offering that is selected would determine the extent to which the applicant or licensee is subject to regulation. If a service offering falls within the statutory definition that encompasses common carrier status, the application and the subsequent license is subject to Title II and the common carrier licensing requirements of Title III of the Act and our Rules. Otherwise, services are provided on a non-common carriage basis, and the application and the licensee would be subject to Title III and certain other statutory and regulatory requirements, depending on the specific characteristics of the service. A licensee is required to adhere to the pertinent requirements in conducting its operations, depending on whether the operations are common carriage or not.

209. Telecommunications services and video programming distribution services have been identified by commenters as the likely uses for LMDS spectrum over the short term. Since our issuance of notices of proposed rulemaking in this proceeding, the regulatory status of these and related services has been addressed and modified in the 1996 Act. The impact of the 1996 Act on the nature of these services for LMDS is discussed below to assist applicants in determining their choice of regulatory status.

(b) Telecommunications Services

210. A wide array of telecommunications services may be provided in LMDS, including one-way and two-way voice and data services and video conferencing. It is expected that many may be offered in the local telephony marketplace as an alternative to the wired telephone network. In their comments, telephone service providers argue that providers of telecommunications service under an LMDS license should be treated as common carriers subject to Title II requirements in the same manner as other telecommunications services.[324]

211. The 1996 Act provides that a telecommunications carrier will "be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[325] A telecommunications service is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effec-

[323] Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, WT Docket No. 95-47, Report and Order, 11 FCC Rcd 6610 (1996) (*IVDS Report and Order*); *CMRS Flexible Service Report and Order*, 11 FCC Rcd at 8965.

[324] GTE Comments to *Third NPRM* at 7; Video/Phone Comments to *First NPRM* at 11.

[325] 47 U.S.C. § 153(44).

tively available directly to the public, regardless of the facilities used."[326] Telecommunications means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[327] We adopted these definitions in new Part 51, which provides the rules governing interconnection of such carriers.[328] Thus, to the extent an LMDS licensee is providing a service that fits within these definitions, that licensee is subject to Title II and it is governed by the common carrier requirements pertinent to its services and set out in our rules.

212. The 1996 Act established certain general duties pursuant to which telecommunications carriers must interconnect with other telecommunications carriers. It also established certain requirements under which LECs must provide interconnection to all telecommunications carriers. In implementing these provisions, we held that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used.[329] Thus, to the extent an LMDS common carrier licensee is a telecommunications carrier, it is governed by the general duties set out in new Rule 51.100 that provide for interconnection with other telecommunications carriers. Such a carrier would also be required to adhere to any other provisions in Part 51 that may be pertinent to a telecommunications carrier. To the extent that such an LMDS provider would meet the definition of a LEC, it also would be governed by the obligations applicable to all LECs in Subpart C of Part 51 of our rules.[330]

(c) Video Programming Distribution and Other Non-Common Carrier Services

213. To the extent licensees are not offering telecommunications services or common carrier services as set forth in *NARUC I*, they will not be regulated as common carriers. Thus, if licensees transmit information that is not of the user's choosing or offer telecommunications only for internal purposes, the licensees are exempt from Title II to the extent of such service. Such services would include MVPD to subscribers, since such services

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[326] 47 U.S.C. § 153(46).

[327] 47 U.S.C. § 153(43).

[328] *Local Competition First Report and Order*, at para. 992 and Appendix B (adopting new Rule 51.5).

[329] *Id.* at para. 993.

[330] *Id.* at Appendix B (adopting 47 CFR § 51.100, Subpart C).

would not involve information of the user's choosing.[331] We proposed that applicants be allowed to choose to be licensed on a non-common carrier basis in order to meet the demand for MVPD to subscribers. We have recognized that LMDS represents a potential technology to compete with wired cable television systems and that the LMDS frequencies may be used to deliver multichannel video programming.[332] Such services also would include private uses of the spectrum for internal purposes. Although we did not specifically propose to license LMDS in the performance of private microwave services, purely internal uses are inherently permitted under an authorization that allows non-common carrier services to be provided.

214. The 1996 Act adopts a new section in Title VI that provides for the regulatory treatment of video programming services by wireless providers. Specifically, Section 651(a)(1) provides that, to the extent a common carrier or any other person is providing video programming to subscribers using radio communications, "such carrier (or other person) shall be subject to the requirements of Title III and Section 652, but shall not otherwise be subject to the requirements of this title."[333] We interpret Section 651(a)(1) as setting forth all applicable sections of the statute. Because Section 651(a)(1) does not include a reference to Title II, we believe that a person providing video programming to subscribers using radiocommunications would not be subject to Title II of the Act. We note that the next provision in Section 651(a)(2) specifically provides for Title II regulation in addressing non-radio based services.

215. It appears that, to the extent an LMDS licensee provides MVPD, the intent of the statute is to regulate the service on a non-common carriage basis. This is consistent with the regulatory classification we assigned to video programming in adopting election rules for MDS[334] and to those services that did not qualify as common carriage in adopting election rules for satellite services.[335] It is also consistent with our consideration of the video programming service options available to telephone companies under the 1996 Act. We have stated that Section 651(a)(1) offers them the option to "provide video programming to subscribers through radio communication under Title III," while Section 651(a)(2) offers the

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[331] An MVPD is defined in Section 602(13) of the Communications Act to mean "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, ... who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 602(13).

[332] *1996 Cable Competition Report*, at paras. 2, 65-66.

[333] 1996 Act § 651, 47 U.S.C. § 571.

[334] *MDS Report and Order,* 2 FCC Rcd at 4252 (para. 8).

[335] *Domsat Sales Memorandum Opinion and Order*, 90 FCC 2d at 1245, 1259 (paras. 1, 22, 52).

option to "provide transmission of video programming on a common carrier basis under Title II."[336]

216. As a wireless service provider, the LMDS licensee providing video programming services is not subject to franchising or regulation as a cable system under Title VI of the Act, other than Section 652, or under the Commission's Cable Rules in Part 76. As noted above, Section 651(a)(1) specifically excludes a radio-based system from the other provisions of Title VI for cable communications, apart from Section 652.

217. The 1996 Act removed the statutory ban on telephone companies' offering video programming in their service areas and repealed our previous rules and policies for telephone-network video systems, known as video dialtone.[337] Thus, our request for comments in this proceeding regarding how the video dialtone policies might affect common carrier LMDS providers is moot. In addition to the video programming service options in Sections 651(a)(1) and (2) discussed above, the 1996 Act added Section 653 to the Communications Act establishing OVS as a new framework for telephone companies to enter into the video programming marketplace. Section 653 permits LECs and others to provide cable service to subscribers through an OVS that complies with the special provisions of the section.[338] OVS is not subject to common carrier regulation under Title II and is entitled to reduced cable regulation under Title VI. We have adopted rules in Part 76 of our rules to implement the requirements for establishment and operation of an OVS, and we have interpreted Section 653 as allowing even non-LECs to operate an OVS.[339] Section 651(a)(4) specifically permits a common carrier to elect to provide video programming by means of an OVS.[340] Thus, an

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[336] Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems: CS Docket No. 96-46, Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58: CC Docket No. 87-266 (terminated); Report and Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14639, 14640 (para. 3) (1996) (*OVS Notice*).

[337] 1996 Act §§ 302(b)(1), 302(b)(3).

[338] 1996 Act § 653, 47 U.S.C. § 573.

[339] Implementation of Section 302 of the Telecommunications Act of 1996 -- Open Video Systems, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 2945 (1996) (*OVS Second Report and Order*), Third Report and Order and Second Order on Reconsideration, FCC 96-334, released Aug. 8, 1996 (*OVS Third Report and Order and Second Reconsideration*).

[340] Section 651(a)(4) of the Communications Act, 47 U.S.C. § 571(a)(4), provides, in part:

> ELECTION TO OPERATE AS OPEN VIDEO SYSTEM -- A common carrier that is providing video programming in a manner described in paragraph (1) or (2), or a combination thereof, may elect to provide such programming by means of an open video system that complies with

LMDS licensee that is a common carrier could elect to provide video programming under the OVS rules, rather than on a non-common carrier basis under the LMDS rules.

b. Regulatory Framework for Licensing LMDS

(1) Background; Comments

218. In the *First NPRM,* we proposed to adopt procedures similar to those for MDS to permit the LMDS applicant or licensee to choose whether it will operate as a common carrier or non-common carrier.[341] We proposed an election mechanism for a licensee to follow whenever it wanted to change its regulatory status between common carrier and non-common carrier.[342] Under the mechanism, the applicant or licensee would choose whether to operate as a common or non-common carrier on a channel-by-channel and on an individual cell basis and notify the Commission accordingly. Authority would be issued on either a common carrier or a non-common carrier basis, as requested by the applicant. Areas and channels not on record as having non-common carrier status would be presumed to have common carrier status. Licensees would be required to maintain an accurate record of their status elections with the Commission. Changes in status were to be reported within 10 days of the effective date of the change. Common carrier licensees would be required to follow the special discontinuance procedures we adopted for MDS when they changed status.[343] In the *Third NPRM,* we proposed additional options in which we would presume all services to be common carriage, unless the applicant demonstrated otherwise.[344]

219. As discussed above, commenters urge us to adopt a flexible regulatory framework for authorizing LMDS that allows the broadest possible performance of services with the least amount of regulatory interference.[345] None of the commenters believes that a presumption of common carrier status is appropriate. Bell Atlantic and CellularVision contend that, if a presumption of regulatory status has to be applied to LMDS providers, it should be non-common carrier status because the near-term use would be for distribution of

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section 653.

[341] *First NPRM,* 8 FCC Rcd at 568, Appendix B.

[342] *Id.* at 569, Appendix B, Proposed Rule § 21.1003.

[343] 47 CFR § 21.910.

[344] *Third NPRM,* 11 FCC Rcd at 88-89 (paras. 94-96).

[345] See paras. 203-204, *supra.*

multichannel video programming.[346] BellSouth argues that we should not prejudge the regulatory status of the services yet to evolve, while GTE contends that LMDS should be designed such that competitive market forces are the controlling factors.[347]

220. Commenters, however, request that we ensure that licensees operate in a manner consistent with their claimed regulatory status. BellSouth asserts that a provider's decision to elect common or non-common carrier status is irrelevant unless the provider actually operates consistently with that choice. It agrees with our proposal that applicants be required to describe the service they propose to offer in sufficient detail for us to confirm that the status elected is consistent with how the carrier will actually operate. It asserts that the Commission is obligated to retain oversight of compliance with the statutory and judicial standards for status based on the type of service offered.[348]

(2) Decision

221. We adopt a regulatory framework for LMDS that permits the full array of LMDS service offerings without undue regulatory restraint. To achieve our goal, our framework reflects not only the flexibility included in our proposals, but also the statutory, regulatory, and technical changes that have taken place since then to enhance the climate for competition. Our goal is to maintain an open and flexible approach that will allow the business judgments of individual LMDS applicants and licensees to shape the nature and components of the services offered pursuant to LMDS licenses.

222. Thus, we agree with commenters not to apply a presumption of common carrier status to an application. The presumption is unnecessarily restrictive and an inaccurate reflection of the variety of services available in LMDS. We also decline to adopt our proposal to require the applicant to indicate its choice for regulatory status on a channel-by-channel or cell-by-cell basis. LMDS licenses will be based on BTA geographic service areas. Our goal is to provide a sufficiently large service area for each licensee to design systems to meet consumer needs on a local or regional basis, without regulatory concern for the individual channel or cell involved. Licensees are permitted to construct stations and place them in operation anywhere within their authorized geographic areas at any time, unless there are requirements otherwise in our rules that would necessitate the filing of an individual application for separate authorization of a station. An LMDS licensee may be required to adhere to the following filing or authorization requirements in modifying a station: (1) in

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[346] Bell Atlantic Comments to *Third NPRM* at 7; CellularVision Comments to *Third NPRM* at 21.

[347] BellSouth Comments to *Third NPRM* at 8; GTE Comments to *Third NPRM* at 8.

[348] BellSouth Comments to *Third NPRM* at 8.

Section 1.1301 through 1.1319 concerning actions that may have a significant impact on the quality of the human environment, (2) in Sections 22.369 and 101.123 concerning radio frequency quiet zones, (3) Part 17 of our rules concerning antenna structure clearance procedures and the obligation under Section 17.4 to register with the Commission prior to construction, (4) any restrictions regarding border areas under international agreements, and (5) any applicable technical rules in this part.[349]

223. In addition, we do not adopt our proposal to require applicants to describe the services they seek to provide. It is sufficient that the applicant indicate its choice for regulatory status in a streamlined application process. The extent and nature of the services to be provided under the respective classifications are matters for the licensee to decide and not for the Commission to consider in granting a license. As we recently stated, an applicant is to rely on the realities of the services to be provided in electing the appropriate regulatory status.[350] In providing guidance to MDS applicants, we pointed out that an election to provide service on a common carrier basis requires that the elements of common carriage be present; otherwise, the service is non-common carriage.[351]

224. As commenters point out, we rely on the designation by an applicant of its status as a common carrier or non-common carrier to enable us to fulfill our obligations to enforce the common carrier requirements of the statute and our regulations. We have stated that our need for applicants to elect their regulatory classification in their applications serves informational purposes to enable us to determine whether to apply Title II or other statutory requirements to the application and the subsequent operations.[352]

225. We also decline to require an applicant to choose between either common carrier or non-common carrier status in providing services under the broad license to be issued. We find it is inconsistent with the broad service definition and the flexible operations we adopt for LMDS to require the licensee to forgo one category of service for the other category. Licensees may well provide services that include elements of both common carrier and non-common carrier services. Instead, we will permit LMDS to be licensed to allow both common carrier and non-common carrier services in a single license. Thus, under our framework an applicant may request both common carrier and non-common carrier status in the same application, which will result in the issuance of both authorizations in a single license. The licensee will be able to provide all LMDS services anywhere within its licensed

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[349] 47 CFR §§ 1.1301-1307, 22.369, 101.123, 17.4.

[350] *DISCO I Report and Order,* 11 FCC Rcd at 2436 (para. 49).

[351] *MDS Report and Order,* 2 FCC Rcd at 4252 (para. 12).

[352] *DISCO I Report and Order*, 11 FCC Rcd at 2436 (para. 50).